

COURT OF APPEALS OF THE STATE OF GEORGIA

Carl Smart v. State

A20A0432 · No. A20A0432 · Decided February 6, 2020

SUMMARY

The Georgia Court of Appeals dismissed Carl Smart's appeal from the denial of his out-of-time motion for new trial because the motion was filed more than 30 days after entry of the judgment of conviction and therefore did not toll the deadline for filing a notice of appeal. The court explained that Smart could seek permission from the trial court to file an out-of-time appeal and noted that an appeal from denial of an extraordinary motion for new trial would require compliance with discretionary appeal procedures.

CASE DETAILS

COURT	Court of Appeals of the State of Georgia
JURISDICTION	Georgia
DECIDED	February 6, 2020
DOCKET	A20A0432
DISPOSITION	dismissed
PROCEDURAL POSTURE	Smart appealed the summary denial of his pro se out-of-time motion for new trial and motion for appointed counsel.
STANDARD OF REVIEW	Jurisdictional review; the Court of Appeals independently determined whether the notice of appeal invoked appellate jurisdiction.
PRECEDENTIAL VALUE	Published opinion
PARTIES	Carl Smart v. State

TOPICS

- appellate jurisdiction
- appellate procedure
- final judgment rule
- post-conviction relief
- criminal procedure

PRACTICE AREAS

- criminal appellate procedure
- post-conviction relief

QUESTIONS PRESENTED

1. Whether the Court of Appeals had jurisdiction over an appeal from the denial of a motion for new trial filed more than 30 days after entry of the judgment of conviction.
2. Whether the untimely motion for new trial could be treated as an extraordinary motion for new trial despite Smart's failure to follow the discretionary-appeal procedures.

HOLDINGS

1. A motion for new trial filed more than 30 days after entry of the judgment of conviction is void and does not toll the 30-day period for filing a notice of appeal from the underlying judgment and sentence or for seeking an extension of time to do so.
2. An appeal from the denial of an extraordinary motion for new trial must comply with the discretionary-appeal procedures in OCGA § 5-6-35 (a) (7); because Smart did not follow those procedures, the Court of Appeals also lacked jurisdiction on that theory.

KEY QUOTATIONS

“The proper and timely filing of the notice of appeal is an absolute requirement to confer jurisdiction upon the appellate court.”

“We thus lack jurisdiction to consider Smart’s appeal from the denial of his untimely motion for new trial.”

FACTUAL BACKGROUND

After a jury trial, Carl Smart was convicted of simple assault as a lesser included offense of aggravated assault, theft by taking, two counts of fleeing or attempting to elude, reckless driving, driving without a license, driving too fast for conditions, and violating the duty applicable after striking a fixed object. Approximately nine months after entry of judgment, he filed a pro se out-of-time motion for new trial. The trial court summarily denied the motion, and Smart appealed.

PROCEDURAL HISTORY

Following a jury trial, Smart was convicted of multiple traffic- and assault-related offenses. Approximately nine months after judgment, he filed an out-of-time motion for new trial. The trial court summarily denied the motion without a hearing, and Smart filed a timely notice of appeal from that denial. The Court of Appeals dismissed the appeal for lack of jurisdiction because the untimely motion for new trial was void and did not toll the time for appealing the underlying conviction.

DISPOSITION

dismissed

CASES CITED

- Porter v. State, 271 Ga. 498 (521 SE2d 566) (1999)
- Washington v. State, 276 Ga. 655, 656 (1) (581 SE2d 518) (2003)
- Rowland v. State, 264 Ga. 872, 875 (2) (452 SE2d 756) (1995)

- Ponder v. State, 260 Ga. 840, 841 (1) (400 SE2d 922) (1991)

OPINION

PER CURIAM.

Court of Appeals of the State of Georgia ATLANTA, _____ January 30, 2020
The Court of Appeals hereby passes the following order: A20A0432. SMART v. THE STATE. Following a jury trial, Carl Smart was convicted of simple assault (as a lesser included offense of aggravated assault), theft by taking, two counts of fleeing or attempting to elude a police officer, reckless driving, driving without a license, driving too fast for conditions, and violation of duty upon striking a fixed object.¹ Approximately nine months later, Smart filed a pro se “Out of Time Motion for New Trial and Motion for Appointed Counsel.” The trial court summarily denied the motion without holding a hearing, and Smart appeals.

We lack jurisdiction. “The proper and timely filing of the notice of appeal is an absolute requirement to confer jurisdiction upon the appellate court.” *Porter v. State*, 271 Ga. 498 (521 SE2d 566) (1999) (citations and punctuation omitted; emphasis in original).

The record shows that Smart filed a timely notice of appeal from the denial of his “out of time” motion for new trial. That motion for new trial, however, was void because it was filed well over 30 days after entry of Smart’s judgment of conviction. See *id.*; OCGA § 5-5-40 (a) (“All motions for new trial, except in extraordinary cases, shall be made within 30 days of the entry of the judgment on the verdict or entry of the judgment where the case was tried without a jury.”).

Under these circumstances, the “void motion for new trial did not toll the 30-day limit within which [Smart] was required either to file a notice of appeal from the underlying judgment and sentence 1 The jury also found Smart guilty of two additional counts of fleeing or attempting to elude a police officer, but those charges were merged into other charges at sentencing. or to seek from the trial court an extension of time for doing so.” *Porter*, *supra* at 499.

We thus lack jurisdiction to consider Smart’s appeal from the denial of his untimely motion for new trial.² See *id.*; see also *Washington v. State*, 276 Ga. 655, 656 (1) (581 SE2d 518) (2003) (“Generally, an untimely motion for new trial does not toll the 30-day period in which a notice of appeal must be filed and can result in the dismissal of the appeal due to the failure to file a notice of appeal within 30 days of the entry of the judgment of conviction and imposition of sentence.”).

Given our lack of jurisdiction, this appeal is hereby DISMISSED. We note, however, that Smart may request permission from the trial court to file an out-of-time appeal. See *Porter*, *supra*; see also *Rowland v. State*, 264 Ga. 872, 875 (2) (452 SE2d 756) (1995) (“A criminal defendant who has lost his right to appellate review of his conviction due to error of counsel is entitled to an out-of-time appeal.”).

If the trial court grants the motion for out-of-time appeal, Smart may file a notice of appeal within 30 days or pursue other “appropriate post-conviction remedies, including a motion for new trial.” *Ponder v. State*, 260 Ga. 840, 841 (1) (400 SE2d 922) (1991); see also *Porter*, supra. If the trial court denies the motion for out-of-time appeal, Smart “will have a 30-day period within which to file a notice of appeal” from that decision.

Porter, supra. 2 We also lack jurisdiction to consider this appeal to the extent Smart’s untimely motion for new trial could be viewed as an extraordinary motion for new trial. Although an extraordinary motion for new trial is not bound by the 30-day time requirement set forth in OCGA § 5-5-40 (a), an appeal from the denial of such motion must comply with the discretionary appeal procedures in OCGA § 5-6-35 (a) (7).

See *Washington*, supra. Smart did not follow those procedures here. Court of Appeals of the State of Georgia Clerk’s Office, Atlanta,_____ 01/30/2020 I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia. Witness my signature and the seal of said court hereto affixed the day and year last above written., Clerk.